REMAINDER CREATED BY WILL, WHETHER VESTED OR CONTINGENT.—Appellee's wife died, having devised to appellee, in trust, a life estate in all her property with full power of disposition. The will directed that upon the death of appellee, all the property "then left" should go to her son "and other children then living." Appellee survived the children, all of whom died without issue, and claimed the property in fee by inheritance from them. Appellant, who was the neice and only heir at law of testatrix, claimed ownership under the statute of descents. *Held*, appellee had only a life estate, and the remainder after his death will go to appellant in fee. *Bingham* v. *Sumner* (Ala.), 89 So. 479 (1921).

The question presented is whether the remainder devised to testatrix's children was vested in them upon her death or contingent upon their surviving appellee, the life tenant. More narrowly stated, the question is whether the children acquired an inheritable estate.

It is well settled that the law favors vested estates, effective at the death of the testator. *Manderson* v. *Lukens*, 23 Pa. St. 31, 62 Am. Dec. 312 (1854); *McArthur* v. *Scott*, 113 U. S. 340 (1885); *Sumpter* v. *Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274 (1902). And where the language of the will is of doubtful import as to whether a vested or a contingent estate was intended, the estate will be regarded as vested. *Union Mutual Association* v. *Montgomery*, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519 (1888); *Gray* v. *Whittemore*, 192 Mass. 367, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246 (1906). But this preference of the law for vested estates applies only where the language of the testator is so ambiguous that it is impossible to ascertain his intention; for, since his intention governs, a will that plainly indicates his desire to create a contingent remainder will be so construed. *Vashon's Ex'x* v. *Vashon*, 98 Va. 170, 35 S. E. 457 (1900); *In re Moran's Will*, 118 Wis. 177, 96 N. W. 367 (1903); *Freeman* v. *Freeman*, 141 N. C. 97, 53 S. E. 620 (1906). Thus where a devise directed the executors to sell testator's real estate and divide the proceeds among such of his children as were living "at that time and surviving decedents" of such children as may have died, it was held that a daughter who died before the lands were sold, having devised her entire estate to her husband, had no vested interest therein and therefore her interest passed to her children and not to her husband. *Starr* v. *Willoughby*, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623 (1905).

It is not the uncertainty of enjoyment in future but the uncertainty of the right to that enjoyment, which makes the difference between a vested and a contingent interest. *Wiggin* v. *Perkins*, 64 N. H. 36, 5 Atl. 904 (1886). See 4 KENT COMM. 206. The test whether an ambiguous remainder is to be regarded as vested or contingent is whether futurity relates only to the time of possession or payment or is annexed to the vesting of the estate as a condition precedent. *Goebel* v. *Wolf*, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464 (1889); *Ducker* v. *Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135 (1893). The former construction will be adopted if it does not run counter to the terms of the will. Thus where a testator devised lands to his wife for life, directing that

part of them should be sold at her death, and out of the proceeds a legacy should be paid to his daughter, the daughter's estate became vested upon the testator's death, notwithstanding the wife survived the daugher. *Stevens* v. *Carroll*, 64 Ore. 417, 129 Pac. 1044, L. R. A. 1918E. 1095 (1913). See also *Goebel* v. *Wolf*, *supra*, and *Jameson* v. *Major's Adm'r*, 86 Va. 51, 9 S. E. 480, 3 L. R. A. 773 (1889). But it is otherwise if time is clearly annexed to the remainder as a condition precedent to its vesting. Thus, where the proceeds of a sale, directed by a devise to be made after the death of the life tenant, were to be divided between the testator's two children "if they be living", a child who died in its mother's life time never had an interest in the estate. *In re Rudy's Estate*, 185 Pa. St. 359, 39 Atl. 968, 64 Am. St. Rep. 654 (1898). See in this connection *Haward* v. *Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120 (1889); *Allison* v. *Allison*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920 (1903).

The instant case, wherein the remainder was limited to testatrix's children "then living" is analogous to the last three cases cited, and the decision seems sound. For, since testatrix did not anticipate appellee's surviving her children and made no provision for this event, appellant must take by the statute of descents upon the death of appellee.